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No. _____

In The

Supreme Court of the United States

October Term, 1993

PAUL SUREN MOSESIAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ROGER S. HANSON, Esq.
1517 East 4th Street
Santa Ana, California 92701
(714) 953-0638

Attorney for Petitioner
Member of the Bar,
Supreme Court of the
United States

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether a United States District Judge may act on his own without referring the matter to a fellow District Judge when, as here, a timely and sufficient affidavit under 28 U.S.C. 144 is filed asserting that the District Judge has personal bias and prejudice against a criminal defendant then being tried before him?

2. Whether the District Judge wrongly refused to disqualify himself under 28 U.S.C. 455(a) and (b) for any of the asserted reasons?

3. Whether the District Judge must resolve the disqualification under both 28 U.S.C. 455(a) and (b) separately, and, as well, under the combined effect of all of the reasons instead of considering each of them separately?

4. Whether the United States Court of Appeals for the Ninth Circuit failed to apply the commands of 28 U.S.C. 144 and 28 U.S.C. 455(a) and instead applied only 455(b)?

5. Whether the U.S. Circuit Court failed to apply the proper standard, i.e., whether the impartiality of this District Judge might reasonably be questioned in the eyes of the public?

6. Whether the public might reasonably question the impartiality of a United States District Judge trying a federal criminal defendant where:

(a) the judge's ex-law firm is currently representing a party defendant in a parallel civil law

QUESTIONS PRESENTED – Continued

suit that would be affected by the outcome of the federal criminal case under the doctrine of collateral estoppel;

(b) the judge's ex-law firm is also currently a party defendant in a parallel civil law suit that would be affected by the outcome of the federal criminal case under the doctrine of collateral estoppel;

(c) the judge maintains current significant financial investments with partners of his ex-law firm, said financial investments potentially being affected by the outcome of the federal criminal case under the doctrine of collateral estoppel;

(d) the judge yet maintained an active social calendar and contact with members of his ex-law firm;

(e) the government's counsel in the federal criminal trial is a former employee of the District Judge's ex-law firm;

(f) the District Judge, while an attorney, engaged in exacerbated litigation with the criminal defendant, a local attorney, with lingering antipathy; and

(g) the District Judge, while an attorney, sat in judgment in a California State Bar matter which sought discipline against the current criminal defendant, a local practicing attorney?

7. Whether a federal crime was here ever committed within the applicable 5 year statute of limitations and thus whether the District Court ever had jurisdiction over a conspiracy to commit fraud by the U.S. Mail under 18 U.S.C. 1341?

QUESTIONS PRESENTED – Continued

8. Whether a District Judge is required to instruct a federal criminal jury sua sponte concerning withdrawal of a defendant from an alleged 2 party conspiracy?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Paul Suren Mosesian, petitioner, seeks a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit from the memorandum filed August 18, 1992, rehearing and suggestion for rehearing en banc denied February 7, 1994.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit filed its unpublished *Memorandum* on August 18, 1992. This appears as Appendix "A" to this petition.

On February 7, 1994 the U.S. Ninth Circuit denied a petition for rehearing and suggestion for rehearing en banc. A copy of that order appears as Appendix "B" to this petition.

JURISDICTIONAL GROUNDS

(i) The United States Court of Appeals for the Ninth Circuit affirmed the convictions of petitioner by an unpublished *Memorandum* filed August 18, 1992. A copy of that memorandum appears at Appendix A-1.

(ii) The U.S. Ninth Circuit denied a Petition for Rehearing/Suggestion for Rehearing En Banc on February 7, 1994. A copy of that Order appears at Appendix B-1.

(iii) Jurisdiction to review by Certiorari a decision of a United States Circuit Court in a criminal case is provided under 28 U.S.C. 1254.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

UNITED STATES STATUTES INVOLVED

28 U.S.C. 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

> **(1)** Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> **(2)** Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purpose of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious charitable, fraternal, or civil organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance of discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

STATEMENT OF THE CASE

This case seeks certiorari to the U.S. 9th Circuit from its affirmance of a federal criminal conviction in the Eastern District of California.

Petitioner Mosesian was a member of the Bar of the Supreme Court of California and a practicing attorney in the City of Fresno, California, during all times covering the events of this federal criminal proceeding brought in the Eastern District of California.

The case came before U.S. District Judge Robert Coyle, then one of 3 U.S. District Judges available in the Fresno Branch of the Eastern District of California. Other available Judges at that time in the Courthouse at Fresno were Senior U.S. District Judge Myron Crocker and District Judge Edward Dean Price.

HISTORICAL FACTS

Petitioner Mosesian purchased a valuable "cutting horse" named Classy Doc Bar in 1981 for the sum of $275,000. The horse, Classy Doc Bar, was born a foal of the famous quarter horse Doc Bar, and a mare known as Classy Red, in the spring of 1973. Doc Bar, as a stud, had produced numerous offspring that had earned in excess of $50 million in competition on the cutting horse performance circuit.

Petitioner Mosesian felt that he had achieved a bargain in his purchase of Classy Doc Bar for $275,000 and he immediately took steps to insure his possession by the purchase of an equine mortality policy on Classy Doc Bar for $500,000. During the time petitioner owned Classy Doc Bar he was, of course, paying substantial interest on a $250,000 loan obtained to buy the horse, was paying some $20,000 per year on equine mortality insurance, and was incurring costs for upkeep of the horse, all of which mandated substantial equine insurance coverage. By the end of 1984, petitioner had

invested approximately $500,000 in the horse, exactly what the animal was insured for.

While the initial insurance obtained on the animal was confined to a single policy of $500,000, Ronald Dumm, the insurance broker obtaining the underwriting, eventually broke the $500,000 into 3 separate insurance companies, and policies, for $200,000, $200,000, and $100,000 each.

In January, 1985, petitioner Mosesian sold Classy Doc Bar to one Lawrence Rocker for $750,000. In view of that sale petitioner sought to elevate the totality of the equine insurance to $750,000 but was successful only in the addition of a 4th policy for $150,000, the latter policy being furnished by the Insurance Company of Ireland. Thus the total insured value of Classy Doc Bar was $650,000 in early 1985.

Classy Doc Bar died on April 11, 1985 at a near-by to Fresno, California boarding stable.

The cause of the death of the horse was never determined although a comprehensive post-mortem autopsy was performed on the animal by a Professor of Veterinary Pathology from the College of Veterinary Medicine from the University of California at Davis. Thus no one was able to scientifically assert or even contend that either petitioner Mosesian or the purchaser, Rocker, had criminally caused the animal's demise, and evidence to that end was never presented either at Civil proceedings or in the criminal proceeding from which Certiorari is now sought.

In mid-1985, petitioner Mosesian made demand by U.S. Mail on the 4 insurance companies carrying coverage on the deceased horse, including the Insurance Company of North America, who had written a $200,000 policy. These letters were written beginning May 20, 1985, and within a couple months thereafter, solely by petitioner Mosesian, and not joined by the horse's buyer, Lawrence Rocker, since Mosesian and Rocker had agreed to rescind the sale agreement due to the death of the horse. The mutual rescission occurred after the death of the horse on April 11, 1985 and before the first demand letter was mailed on May 20, 1985.

None of the 4 insurance companies tendered payment on their respective policies, responding by hiring investigators and demanding the horse's breeding records, official show records, and information about the persons responsible for the care of the animal prior to its death. One of these investigators, one William Graham, appeared on local Fresno television, asserting that the horse had met his death by foul play, and that, of course, petitioner was at the bottom of a plot to kill the animal for the elevated insurance policies that existed on it.

In its rebuff of petitioner's claim on its policy, the Insurance Company of North America was represented by the local Fresno law firm of McCormick, Barstow, and particularly partner Gordon Park. Other partners in the firm included attorneys Stephen Barnett and Michael Woods. (See Martindale-Hubbell listing of biographical sketches of McCormick, Barstow, Sheppard, Wayte and Carruth, 1331 Fulton Mall, Fresno, California, in 1990 which includes partners Stephen Barnett, Michael G. Woods, and Gordon Park.) That law firm was, and is, one of the leading firms in Fresno, a central California community of some 200,000 population. (Appendix C-1, Martindale-Hubbell listings).

The McCormick, Barstow firm joined the other 3 insurance companies in resisting payment on the 4 policies, and on or about February 13, 1989, nearly 4 years after the horse had died on April 11, 1985, petitioner Mosesian sued the 4 insurance carriers, the law firm of McCormick, Barstow, Sheppard, Wayte, and Carruth, specifically partner Gordon Park, insurance broker Dumm, and the peripatetic insurance investigator, William Graham, the latter whom had carried on an extensive campaign of slander against petitioner, whom he asserted had structured the death of the horse in an undetectable manner. *See Mosesian v. Park*, No. 345940-1, Superior Court of California, County of Fresno, filed February 13, 1989.

On March 8, 1990, a grand jury for the Eastern District of California indicted petitioner Mosesian and the purchaser of the horse, Lawrence Rocker, on 4 counts of mail fraud, 18

U.S.C. 1341, and one count each of conspiracy to commit mail fraud, 18 U.S.C. 1871, and aiding and abetting mail fraud, 18 U.S.C. 2.

The indictment asserted, inter alia, that the sale of the horse to Rocker was a sham, that a $750,000 selling price was falsely asserted to elevate the insurance coverage to unrealistic higher amounts, and, while never proven, an inference that petitioner and Rocker had caused the death of the animal to collect the insurance. It was asserted via several government witnesses at the federal trial that the horse's actual value was only in the high 5 figures to low 6 figures because of its demonstrated lack of winnings and lack of successful performance of the foals which it had sired since petitioner Mosesian had purchased it in 1981; further, that as a matter of equine mortality policy law, that the policies would pay off only to the level of the *true value* of the animal rather than the $650,000 *face value* of the 4 policies. This federal indictment asserted a conspiracy between petitioner and Rocker to create a sham sale in January, 1985 by the contract of sale for $750,000, but it was not demonstrated what *federal* law was then being broken by 2 men constructing such a contract within a private office in the City of Fresno in January, 1985, and doing nothing with it in violation of federal law, in order to escape running of the 5 year statute of limitations in January, 1990.

After the horse's death on April 11, 1985, the purchaser Rocker withdrew from the buy-sell agreement and at the time of his withdrawal, no demonstrated *federal crime* or *federal* conspiracy existed. At time of the indictment the 5 year federal statute of limitations had clearly expired.

Rocker, as stated, did not participate whatsoever in the writing of the first letter, on May 20, 1985, to the INA requesting payment of the $200,000 policy that that firm had written.

Thus if writing the 4 letters, which became the subject of the 4 separate mail fraud counts, constituted the *federal crimes* involved, only petitioner and not Rocker was involved,

and that demarcation becomes important to the issue of whether a *federal conspiracy* ever existed, and whether the statute of limitations of 5 years had run on March 8, 1990 for any "federal conspiracy" that occurred on the single integral date in early January, 1985 by the creation of the buy-sell agreement on the horse. Rocker had, as stated, withdrew from the buy-sell agreement during the quiescent period between the January, 1985 contract and the writing of the first letter on May 20, 1985.

Trial of this case came before U.S. District Judge Robert Coyle in Fresno in late 1990, and culminated by conviction of both petitioner Mosesian and Lawrence Rocker of the above 4 mail fraud counts, conspiracy, and abetting, on December 10, 1990. Prior to the trial commencing, petitioner Mosesian sought to recuse U.S. District Judge Robert Coyle in a timely motion under 18 U.S.C. 144 and 28 U.S.C. 455(a) and (b).

The reasons seeking recusal of this federal judge were manifold and omnibus, since:

(a) Petitioner had sued the Insurance Company of North America and the law firm of McCormick, Barstow, and particularly one of its partners Gordon Park, in the civil case above noted, well over a year before the federal criminal case commenced; the outcome of that related *civil* litigation would be determined in favor of those *civil* defendants if the government could convict petitioner Mosesian of the *criminal* charges pending before U.S. District Judge Coyle. This followed under the doctrine of collateral estoppel, clearly a part of California civil law, set forth in the Supreme Court of California decision *Teitelbaum Furs, Inc., et al., v. The Dominion Insurance Company,* 58 Cal.2d 601, 25 Cal.Rptr. 559, 375 P.2d 439.

(b) Potential government witnesses in the criminal case would include members of that law firm and persons and entities that that firm represented, including the investigator, William Graham, it had hired, and the broker, Ronald Dumm, who had secured them as one of the underwriters of the 4 equine mortality policies on Classy Doc Bar.

The reasons asserted by petitioner Mosesian for recusal of U.S. District Judge Coyle were:

(1) Judge Coyle came to his appointment on the federal bench from a partnership in the Fresno law firm McCormick, Barstow; that law firm was defending the parallel civil suit *Mosesian v. Park, et al.*, to recover the insurance proceeds for the death of the horse, and thus the *client* of the law firm, INA, would directly benefit in the *civil* case from the outcome of the *criminal* case, U.S.A. v. Mosesian; the client paid the law firm and its partners;

(2) The McCormick, Barstow firm was, itself, a civil defendant in the previously filed civil law suit, and thus Judge Coyle's former law partners stood to benefit if petitioner Mosesian was convicted of the criminal charges;

(3) U.S. District Judge Coyle yet maintained financial interests with various partners in that firm, including at least partners Stephen Barnett and Michael G. Woods, in various real estate and trust ventures. (See Exhibits Appendix "D" to this petition; 1981 trust involving McCormick, Barstow partner *Michael G. Woods* and Susan Lyons Woods, with *Robert E. Coyle* and Faye B. Coyle, respectively, as husbands and wives, and *Stephen Barnett*, another McCormick, Barstow partner; see, secondly, December 30, 1985, Grant Deed to *Stephen Barnett* and *Robert E. Coyle);*

(4) Judge Coyle maintained an active social life with members of his former firm who stood to benefit from a successful federal prosecution of petitioner Mosesian before Judge Coyle;

(5) The assistant U.S. Attorney prosecuting Mosesian, William Hahesy, had formerly been associated with the McCormick/Barstow firm;

(6) Judge Coyle had previously sat as an attorney-judge in California State Bar proceedings taken against petitioner Mosesian while they were both practicing lawyers in Fresno;

(7) Judge Coyle, as a member of the McCormick, Barstow firm, had represented various civil defendants sued by clients of Mosesian in Civil Tort claims, and an unpleasant and acrimonious relationship had developed between the now-sitting federal judge and Mosesian.

The dislike of Petitioner Mosesian and hard feelings held by the then-practicing attorney, Robert E. Coyle, yet existed at the time of the federal trial because of (6) and (7) above, requiring disqualification under 28 U.S.C. 144 and 455(b)(1).

The summation of the above 7 items were asserted to require disqualification because this District Judge's impartiality "might reasonably be questioned" under 28 U.S.C. 455(a), should any one of them, in isolation, not trigger the disqualification.

Judge Coyle, however, did not assign resolution of his disqualification to either Senior District Judge Myron Crocker or District Judge Edward Dean Price, but ruled upon it himself, denying his disqualification.

This personal resolution by Judge Coyle of the disqualification motion violated the command of 28 U.S.C. 144.

REASONS FOR GRANTING PETITION FOR CERTIORARI

1. To further resolve and define the requirements under 28 U.S.C. 144 and 28 U.S.C. 455 that govern disqualification of United States District Judges in federal criminal trials where it is shown that parallel civil litigation involving parties and entities with which the district judge has been and is yet involved illustrate that the impartiality of the district judge might reasonably be questioned by the public in the federal criminal trial then before him.

2. To provide direct decision command from this court that 28 U.S.C. 144 absolutely requires the District Judge to assign the challenge of his disqualification to another judge and that he can not act on it himself.

3. To rule upon whether a district judge's impartiality might reasonably be questioned by the public under 28 U.S.C. 455(a) where the District Judge has the relationships of:

(a) his former law firm is a party defendant to a parallel civil suit that would be potentially impacted by the federal criminal trial and its outcome;

(b) his former law firm represents a party defendant to a parallel civil suit that would be potentially impacted by the federal criminal trial and its outcome;

(c) being involved with members of his former law firm in business and financial matters where civil judgments against those partners could be impacted by the outcome of the criminal case;

(d) the government, practicing as a litigant, is represented by counsel that was employed by the court's former law firm;

(e) maintaining extensive social contacts with members of the former law firm;

(f) a previous acrimonious and bitter civil litigation history with the criminal defendant when they were both practicing attorneys; and

(g) sitting in judgment on and in a previous state bar disciplinary hearing against and involving the criminal defendant when they were both practicing attorneys.

4. To rule whether a *federal* conspiracy was created and commenced in January, 1985, by the buy-sell contract concerning the cutting horse Classy Doc Bar, said contract being mutually rescinded before May 20, 1985, the date the first act occurred that could be construed to be a substantive allegation of violation of *federal* law, and thus to rule whether federal jurisdiction ever occurred in this case as to an "federal conspiracy," within the 5 year statute of limitations, the federal indictment being returned on March 8, 1990.

5. To determine whether minimally effective assistance of counsel under the Vth and VIth Amendments in federal criminal trials requires defense counsel to insure that jury

instructions covering all aspects of the defense are timely proffered.

6. To determine whether Withdrawal Instructions from a federal conspiracy are a sua sponte requirement of district judges where applicable.

ARGUMENT I

THE DISTRICT COURT WRONGLY REFUSED TO DISQUALIFY HIMSELF UNDER 28 U.S.C. 455 AND WRONGLY REFUSED TO SUBMIT THE ISSUE OF DISQUALIFICATION TO ANOTHER DISTRICT JUDGE UNDER 28 U.S.C. 144. CERTIORARI SHOULD BE GRANTED TO ELUCIDATE STANDARDS REQUIRING DISQUALIFICATIONS OF DISTRICT JUDGES IN FEDERAL TRIALS WHERE, AS HERE, HIS OR HER IMPARTIALITY MIGHT BE QUESTIONED.

It is clear that 28 U.S.C. 144 commands that a challenge to a United States District Judge because of personal bias or prejudice must be submitted to another judge for determination. This is, of course, as simple as the old adage that the fox should not be allowed to guard the hen house.

Moreover, under 28 U.S.C. 455(a) a federal judge *shall* disqualify himself in any proceeding "in which his impartiality *might* reasonably be questioned." The evaluation of whether the District judge's impartiality "might reasonably be questioned" is to be viewed from the eyes of the *public*, not the judge himself, and a host of cases present that basic benchmark. See, e.g., *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980) (. . . the general standard of Section 455(a) was designed to promote the *public's confidence* in the impartiality and integrity of the judicial process, by saying, in effect, that if any reasonable factual basis for doubting the judge's impartiality exists, the judge "shall" disqualify himself and let another judge preside . . . Because 28 U.S.C. 455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias

or prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case *looks to the average person on the street . . .*)

And in this Circuit, for example, the United States Ninth Circuit in ruling in *Preston v. United States,* 923 F.2d 731 (9th Cir. 1991) that U.S. District Judge J. Spencer Letts of the Central District of California had wrongly refused to disqualify himself, and that a fellow district judge acting on the motion to disqualify also erred in denying disqualification, said at 734:

> The standard for judging the appearance of partiality requiring recusal under 28 U.S.C. 455 is an objective one and involves ascertaining "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned."

Further, that panel of the Ninth Circuit said at 923 F.2d 735:

> The Supreme Court has never limited recusal requirements to cases in which the judge's conflict was with the parties named in the suit. See *Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). Rather, the focus has consistently been on the question whether the relationship between the judge and an ***interested party*** was such as to present a risk that the judge's impartiality in the case at bar might reasonably be questioned *by the public . . .*

Preston v. United States presented a much more peripheral and less suggestive reason for the public to question the sitting of that District Judge than the case at bar. In Preston, the District Judge had once been "of counsel" to a Los Angeles law firm that had represented Hughes Aircraft Company who was then not a party to the civil lawsuit, Preston v. United States. However, had judgment been rendered against the United States, the government could have *potentially* looked to Hughes for indemnification for a death that had been suffered in a government contract being fulfilled at Hughes Aircraft.

Hughes thus was an "interested party" to the litigation even though it was not an actual party in the litigation then before the District Court. The Ninth Circuit, in this published opinion, found that "the present case generated such a risk," i.e., that the judge's impartiality might reasonably be questioned by the public. In fact neither Hughes Aircraft Company, nor the District Judge's former firm, Latham and Watkins, to which he was "of counsel" and not a partner or an associate, were being sued in any ancillary or parallel proceeding.

This status is in rather stark reality to the posture facing U.S. District Judge Robert Coyle of the Eastern District of California in the case at bar, for Judge Coyle's former law firm, of which he was a *full partner,* had a dual relationship in a parallel civil lawsuit, *Mosesian v. Park*, et al., No. 345940-1, Superior Court of the State of California for the County of Fresno. (Filed February 13, 1989). Judge Coyle's former lawfirm, the Fresno firm of McCormick, Barstow was then defending the Insurance Company of North America, one of the 4 insurance carrier defendants that petitioner Mosesian had sued to recover indemnification on equine mortality policies, *and* the firm and its partners were themselves civil defendants in that very same lawsuit. That lawsuit had been on file for over a year prior to petitioner Mosesian's indictment on March 8, 1990 by the Eastern District of California grand jury that led to the criminal trial before U.S. District Judge Robert Coyle.

Under the reasoning of *Liljeberg* of this Honorable Court, pointed out by the Ninth Circuit in *Preston v. United States,* 923 F.2d 731, 735, supra, there existed a relationship between District Judge Coyle and his former law firm that could potentially impact on that firm and its client, INA, a carrier of a $200,000 equine mortality policy on the deceased horse Classy Doc Bar, that would "present a risk that the judge's impartiality be questioned by the public." The threat is, of course, via the doctrine of collateral estoppel embraced in the California Supreme Court decision *Teitelbaum Furs, Inc. v. The Dominion Insurance Co.,* 58 Cal.2d 601, 25 Cal.Rptr. 559, 375 P.2d 439. Application of the collateral estoppel

doctrine at bar commands the conclusion that a conviction in the U.S. District Court criminal prosecution of petitioner Mosesian would foreclose Mosesian's prevailing in his civil suit against Judge Coyle's former partners at McCormick, Barstow and, of course, against that firm's client, Insurance Company of North America. See also *Potaschnick v. Port City Construction Co.*, 609 F.2d 1101, 1110-1111 (5th Cir. 1980).

Plainly, therefore, Judge Coyle's former firm was an "interested party" to the criminal case before Judge Coyle and the average member of the public would surely question the Judge's impartiality under the *Liljeberg* standard adopted by the 9th Circuit in Preston, supra.

But there is more, much more; Judge Robert Coyle yet maintained a host of financial tie-ins to current members of that firm, being involved in a major trust with that firm's partners *Michael G. Woods* and his wife, and *Stephen Barnett*. Additionally Judge Coyle owned separate real estate holdings with McCormick, Barstow partner *Stephen Barnett*. See Exhibits D-2 through D-5, this petition for Certiorari. The Judge, moreover, continued an active social schedule with that former law firm, and, indeed, another former member of the Judge's firm, William Hahesy, appeared as the U.S. Attorney to prosecute petitioner Mosesian in the criminal case before Judge Coyle.

Finally, petitioner Mosesian, a very active Fresno, California plaintiff's lawyer, had had years of acrimonious and tumultuous civil litigation with Judge Coyle while he was a practicing attorney-partner and the McCormick, Barstow firm, with lingering antipathy. This federal judge – federal defendant relationship was further exacerbated by the district judge's sitting on a California State Bar disciplinary hearing that was to pass judgment on petitioner Mosesian when the district judge was with his former firm.

In view of all of the foregoing, petitioner via his counsel moved to disqualify Judge Coyle under 28 U.S.C. 144 and 455. Without complying with 144's command that he cease further proceedings and another judge shall be assigned to hear the disqualification proceeding, Judge Coyle denied the motion and presided at petitioner's trial.

Petitioner was convicted and took his appeal to the Ninth Circuit. A panel different in make-up from the *Preston* panel affirmed the conviction on August 18, 1992. That panel labored 1½ years more before it denied a petition for rehearing on February 7, 1994.

An examination of the unpublished 9th Circuit opinion appearing as Appendix A shows that while the panel gave lip service to the concept under 28 U.S.C. 455(a) that disqualification *shall* be required where the "impartiality might reasonably be questioned," it failed to analyze Judge Coyle's refusal to step down on this criteria. See II, A-7 through A-13 of Appendix A. Instead the panel considered *separately* the asserted reasons requiring recusal and made the analysis not under 455(a) but under various subsections of 455(b).

Thus, in considering the judge's former partnership at McCormick, Barstow, the panel concluded that the law firm did not represent a ***party*** to ***this litigation***, i.e., either the United States, or this petitioner, Mosesian, or co-defendant Rocker, and ignored the parallel and highly related civil suit in which that former firm was, quite obviously, a party, and thus the firm became an "interested party" to the criminal case under *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 861 where this Honorable Court held:

> Contrary to petitioner's contentions, this reading of the statute does not call upon judges to perform the impossible – to disqualify themselves based on facts they do not know. If, as petitioner argues, § 455(a) should only be applied prospectively, then requiring disqualification based on facts the judge does not know would of course be absurd; a judge could never be expected to disqualify himself based on some fact he does not know, even though the fact is one that perhaps he should know or one that people might reasonably suspect that he does know. But to the extent the provision can also, in proper cases, be applied retroactively, the judge is not called upon to perform an impossible feat. Rather, he is called upon to rectify an oversight and

> to take the steps necessary to maintain public confidence in the impartiality of the judiciary. If he concludes that "his impartiality might reasonably be questioned," then he should also find that the statute has been violated. This is certainly not an impossible task. No one questions that Judge Collins could have disqualified himself and vacated his judgment when he finally realized that Loyola had an interest in the litigation. The initial appeal was taken from his failure to disqualify himself and vacate the judgment *after* he became aware of the appearance of impropriety, not from his failure to disqualify himself when he first became involved in the litigation and lacked the requisite knowledge.
>
> In this case both the District Court and the Court of Appeals found an ample basis in the record for concluding that an objective observer would have questioned Judge Collins' impartiality. Accordingly, even though his failure to disqualify himself was the product of a temporary lapse of memory, it was nevertheless a plain violation of the terms of the statute.

It must be recalled that in *Liljeberg,* supra, Loyola University was not a direct party litigant in the suit before U.S. District Judge Robert Collins of Louisiana; however, at one time Judge Collins had been a member of the Board of Trustees of Loyola University, and Liljeberg was negotiating with Loyola University to purchase a parcel of land on which Liljeberg was planning to construct a hospital. The success and benefit to Loyola turned, in part, on Liljeberg prevailing in the litigation before Judge Collins.

This Court, as quoted above, held that Loyola University "had an interest in the litigation" and the Judge's affiliation on its Board of Trustees presented to the public an *appearance* of impartiality toward an "interested party." In Liljeberg it was contended that the judge did not have "actual knowledge" of his relationship to the "interested party" Loyola University since he, apparently, was unaware of the role of Loyola University in the sale of the land; however this Court

found that actual knowledge was not necessary, for the appearance of impartiality nonetheless prevailed in the eyes of the public.

At bar, of course, because of the pre-trial motions, U.S. District Judge Coyle was well aware that his connection to the Civil litigants was questioned since his former law firm was itself a defendant and in turn represented another defendant in the parallel civil suit; and, moreover, that he had financial interests right then with various ex-law partners being sued civilly by petitioner Mosesian. It is clear, therefore, that INA and the law firm were "interested parties" to the criminal case before the judge who yet maintained a financial tie to at least 2 of the partners and whose financial future could be potentially impacted by a criminal conviction or acquittal in the very case before him.

Importantly, this Honorable Court considered the same analysis used by the Fifth Circuit, i.e., that

> a violation of §455(a) is established when a reasonable person knowing the relevant facts, would expect that a justice, judge, or magistrate knew of circumstances creating an appearance of impartiality notwithstanding that the judge was not actually conscious of those circumstances.
> (486 U.S. at 850).

Indeed, previous rulings of the U.S. 9th Circuit recognize the duality of relief provided by both 28 U.S.C. 144 and 28 U.S.C. 455. For example, *United States v. Sibla*, 624 F.2d 864, 867-868 (9th Cir. 1980) so acknowledges:

> Section 144 expressly conditions relief upon the filing of a timely and legally sufficient affidavit . . . if the judge to whom a timely motion is directed determines that the accompanying affidavit specifically alleges facts stating grounds for recusal under section 144, the legal sufficiency of the affidavit has been established, and the motion must be referred to another judge for a determination on the merits. . . .
>
> Section 455, on the other hand, sets forth no procedural requirements. That section is directed to the

> judge, rather than the parties, and is self-enforcing on the part of the judge . . . Moreover, section 455 includes no provision for referral of the question of recusal to another judge; if the judge sitting on a case is aware of grounds for recusal under section 455, that judge has a duty to recuse himself or herself. . . .
>
> In light of the difference in procedures for sections 144 and 455, it is apparent that the two sections are not redundant but are complementary, even when the only ground for recusal alleged is biased or prejudice. A party desiring referral to a second judge upon a determination of legal sufficiency may invoke the provisions of section 144 by filing a motion under that section accompanied by a timely and sufficient affidavit. Such a motion should also prompt the judge to whom the motion is directed to determine independently whether all the circumstances call for recusal under the self-enforcing provisions of the section 455(a) & (b)(1), a matter which rests within the sound discretion of the judge . . . Thus, section 455 modifies section 144 in requiring the judge to go beyond the section 144 affidavit and consider the merits of the motion pursuant to section 455(a) & (b)(1).
>
> The net result is that a party submitting a proper motion and affidavit under section 144 can get two bites of the apple, If, after considering all the circumstances, the judge declines to grant recusal pursuant to section 455(a) & (b)(1), the judge still must determine the legal sufficiency of the affidavit filed pursuant to section 144. If that affidavit is sufficient on its face, the motion must be referred to another judge for a determination of its merits under section 144.

At bar the U.S. 9th Circuit never ruled on the key question and key 28 U.S.C. 455(a) standard, i.e., whether a *member of the public might reasonably question the impartiality*; instead the panel only reflected on various elements of Section 455 (b). Not only is this erroneous, but it fails to

focus on what must be considered and resolved both by the District Judge himself, and the reviewing U.S. Circuit Court, under 28 U.S.C. 455(a) and 144.

Indeed, however, 28 U.S.C. 455(b)(4) should clearly here be impacted because the Court *shall* disqualify himself whenever

> He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household has a financial interest in the subject matter in controversy or in a part to the proceeding, or *any other interest that could substantially be affected by the outcome of the proceeding.*

It would appear that potential Civil Judgments obtained by Mosesian against the judge's ex-law partners, with which the judge yet holds financial ownership and interest, constitute "other interest that could be substantially affected by the outcome of the criminal proceeding" under the doctrine of collateral estoppel.

Secondly, at B, page A-10, the panel failed to apply 455(a), and instead jumped to 455(b)(4) and 455(b)(5)(iii), and asserted the ridiculous and irrelevant statement that petitioner had made no assertion that "Judge Coyle holds any financial interest in the horse at issue in the case or in the parties." That panel then asserted that petitioner had not identified the members of the McCormick, Barstow firm "with which Judge Coyle is alleged to have personal investments," although such information was presented to the panel more repletely than the truncated versions appearing in this petition at Appendix D and, of course, the District Judge himself knew of his investments with certain members of his firm, and that personal knowledge is what mandates recusal. The panel focused only on partner *Gordon Park*, a named separate defendant in the civil suit, and ignored the relationship of the Judge with partners Stephen Barnett and Michael Woods, and again failed to resolve how this relationship might appear to the public under the "fox guarding the hen house" inquiry and criteria.

The panel termed the "collateral estoppel" allegations of the criminal conviction and its affect on the law firm and its client, INA, as "an imagined scenario nothing more than a trivial or insignificant matter that merely furnishes a springboard for speculation."

Judge Coyle's continuing social relationship with the defendant law firm in the civil case was, as well, readily excused and that "contact" was in fact embraced, because Judge Coyle could not be held to be a "sterile creature"; here the judge's financial tie-ins with the firm were ignored, (See C, page A-12 of Appendix A), as was the *Liljeberg* mandates of this Honorable Court, 486 U.S. 847, 861.

Finally, the panel fails, once again, to apply either 144 or 455(a)'s commands, claiming that 455(b)(1) does not require recusal because of the previous antipathy emanating from the Judge toward petitioner due to their past relationships.

In summation, of course, the panel failed to consider the catalytic and symbiotic effect of the integrated 7 foregoing reasons that should require district judge recusal, a seeming mandate when a member of the public would consider the totality of circumstances that might question impartiality. Of course, under the Liljeberg doctrine, the judge need only have a tie-in and connection with an "interested party," which is here clearly demonstrated.

Petitioner asserts that the unique facts of this case would have, and should have, required district judge recusal under 28 U.S.C. 144 and 455, and Certiorari should be here granted to provide national guidelines to the U.S. District Courts.

Thus, a summary of U.S. District Judge Coyle's ties to the litigants in this case is as follows:

1. The law firm in which Judge Coyle was previously a partner was a defendant in the related civil suit brought by this petitioner, Mosesian, to recover proceeds of the equine mortality policies;

2. That law firm was also defending one of the insurance companies, Insurance Company of North America (INA), who was a defendant in the civil

case to recover for the death of the horse ($200,000 potential liability).

A conviction of Mosesian in the federal case before Judge Coyle would have easily and conclusively defeated Mosesian's claims in the related civil suit under the doctrine of collateral estoppel;

3. Judge Coyle yet maintained, at the time of the federal case, a financial interest in various real property holdings and trusts with his former partners, who were defendants in the civil case, which would be potentially affected by the outcome of the criminal case before him;

4. U.S. District Judge Coyle yet maintained social contacts with his former law firm, attending parties and like events;

5. One of the Assistant U.S. Attorneys handling the case, William Hahesy, had been a member of Judge Coyle's former firm, and was now prosecuting petitioner Mosesian before Judge Coyle;

6. District Judge Coyle had in the past, before his appointment to the bench, sat as an attorney-judge in State Bar disciplinary proceedings against petitioner Mosesian; and

7. District Judge Coyle, while a member of his former firm, *McCormick, Barstow,* had engaged in acrimonious civil litigation against petitioner Mosesian; petitioner asserted that the ill feelings yet prevailed at the time of the federal criminal trial.

See 28 U.S.C. 455(b)(1).

Petitioner asserts, within the meaning of 28 U.S.C. 455(a) that U.S. District Judge Coyle's impartiality "might reasonably be questioned" for any one of the foregoing seven distinct reasons, and surely for the combined effect of all seven of the above reasons.

Further, within the meaning of 28 U.S.C. 455(b)(4), Judge Coyle was aware that his wife and he had a financial interest in real property yet owned together with other members of the Fresno law firm of *McCormick, Barstow*, and that

said firm and its partners, including partner Gordon Park, were civil defendants in the related civil case *Mosesian v. Park, et al.*, No. 345940-1, Superior Court of California, County of Fresno, and that the outcome of the related civil litigation would be affected by the result in the case before him, United States v. Paul Mosesian and Lawrence Rocker, under the collateral estoppel doctrine. This interrelation between the civil and criminal case is "an interest that could be substantially affected by the outcome of the proceeding" then before him.

Even if it be contended that Judge Coyle was not "aware" of his financial tie-ins with partners of his former firm, then both a defendant and a representative of one of the insurance company defendants in the related civil case, within the meaning of 28 U.S.C. 455(c), Judge Coyle "should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household." See also 28 U.S.C. 455(b)(5)(iii). See *Liljeberg*, supra, 486 U.S. 847, 859.

Under 28 U.S.C. 455(b) and (c), disqualification is mandatory under the "shall" provision.

Certiorari should, therefore, be granted to command application of 28 U.S.C. 144, and 28 U.S.C. 455(a) in parallel with specific focus on elements of 455(b). At bar the Circuit Court failed to apply both 144 and 455(a) to the role of this District Judge.

ARGUMENT II

NO FEDERAL CONSPIRACY WAS COMMITTED NOR WAS ANY OVERT ACT IN FURTHERANCE OF THAT FEDERAL CONSPIRACY COMMITTED AFTER MARCH 9, 1985 AND BEFORE THE NON-FEDERAL "CONSPIRACY" ENDED; THE 5 YEAR STATUTE OF LIMITATIONS FOR A FEDERAL CONSPIRACY AND SUBSTANTIVE CRIMES THUS HAD EXPIRED ON MARCH 9, 1990, THE DATE OF THE INDICTMENT.

A key issue of federal jurisdiction is presented in this challenge to the conviction of petitioner Mosesian and his co-

defendant Lawrence Rocker, for a "federal conspiracy" to commit mail fraud. See 18 U.S.C. 3282.

The facts that preclude any federal conspiracy existing on or before March 9, 1985 are:

1. In January, 1985 petitioner and Rocker entered into the buy-sell agreement on the cutting horse Classy Doc Bar.

2. This buy-sell agreement violated no asserted federal law, and, if fraudulent, would violate only some non-defined state law.

3. On April 11, 1985, the horse died.

4. Thereafter, and before May 20, 1985, petitioner and Rocker mutually rescinded the buy-sell agreement; at that time no federal crime or conspiracy to commit a federal crime existed.

5. On May 20, 1985 petitioner, acting alone, wrote the first letter to an insurance company asserting death of the horse and requesting/demanding payment of the equine mortality policy.

6. Up to the writing of the 1st letter, no federal crime was committed and no overt act in furtherance of conspiracy to commit a federal crime occurred.

7. Thus no conspiracy to violate any federal law, supported by overt acts, occurred before March 9, 1985 and such a crime was extinguished by the running of the statute of limitations of 5 years before March 9, 1990, the date of the indictment.

The Circuit Court at III, pages A-14 – A-15, Appendix A concluded that the "overt acts" of the letters being written by petitioner Mosesian between May 20 and July 5, 1985 constitute "at least one overt act" that occurred after March 9, 1985. This is erroneous because co-defendant Rocker and Mosesian rescinded the buy-sell agreement *before* any letter was written and before any conspiracy to commit a *federal crime* occurred, and because petitioner Mosesian can not conspire with himself, his personal writing of the 4 letters do not constitute overt acts in support of the then non-existing *federal* conspiracy.

It is of interest that the Circuit Court at footnote 4, page A15, alludes to the district judge's "refusal" to instruct the jury on "withdrawal." That, however, is erroneous because the Court suggested to counsel the need to instruct the jury on Rocker's withdrawal, as Rocker had testified to repletely; the following occurred, drawn from the Reporters' Transcript at pages 1599-1601:

> THE COURT: All right. Fifty-seven, "Withdrawal from the conspiracy."
>
> MR. NOLAN: (Mosesian's Counsel) I'm withdrawing the request of that.
>
> THE COURT: I don't think so.
>
> MR. NOLAN: I don't think there's enough evidence to give it.
>
> MR. FALLER: (AUSA) I don't think there's any evidence of withdrawal.
>
> MR. CHAVEZ: (Rocker's Counsel) I'm not going to say there's not enough evidence but I –
>
> THE COURT: Well, Mr. Chavez, I would think, you know, just food for thought only. That to argue that point, you're giving up points before you get to it, and I don't – you know –
>
> MR. CHAVEZ: Well, I just – I guess –
>
> THE COURT: Let me ask you this: If we assumed there was a conspiracy in this case between the two defendants, what evidence – let's make the assumption that the evidence is accepted by the jury. What evidence is there that Mr. Rocker withdrew from the conspiracy that would cause the jury to find him not guilty?
>
> MR. CHAVEZ: Well, I guess the evidence that exists comes too late, I guess.
>
> THE COURT: Well, think a minute. There isn't a beginning of this conspiracy that would save him as far as I can see. I'm not – if you can – I'll be happy to give the instruction if you can show me that this was a conspiracy that did a whole bunch of things five years ago. Didn't have to be five years.

> And that what he's charged with here today was not done while he was a member of the conspiracy. All kinds of terrible horrible things, and he withdrew from that conspiracy.
>
> MR. CHAVEZ: Okay, I withdraw my request.
>
> THE COURT: No. No. Am I making sense?
>
> MR. CHAVEZ: No, you're making sense.
>
> THE COURT: I don't have any problem talking about it again, but I can't figure out what he could have withdrawn from that would only make him half pregnant. Or it wouldn't just make him half pregnant. Let's put it that way. All right.
>
> MR. NOLAN: I'll withdraw 58, Your Honor.
>
> THE COURT: All right, I think it's covered in the patterned instructions sufficiently.

It is therefore plain that the Withdrawal Instruction and the running of the Statute of Limitations before any federal conspiracy occurred and the issue of whether any federal conspiracy ever occurred in this case should have been presented to the jury via sua sponte jury instructions and surely under the provisions that effective counsel would demand and insure that it occurs.

Other Circuits, as well, have provided for the *Withdrawal Defense*. See Blackmar and Devitt, Federal Jury Instructions, Section 28.11. Inter alia, an announcement to other members of the conspiracy is required, and in the alleged 2-man conspiracy at bar to construct a "buy-sell" agreement for the cutting horse, a mutual rescission of that agreement before any federal crime of conspiracy was committed would satisfy the requirement. In addition, it must be shown that the withdrawal occurred before any overt act occurred in furtherance of the conspiracy to commit a federal crime. Here it is obvious that no possible federal crime occurred until petitioner Mosesian, on May 20, 1985, mailed the first of 4 letters to the separate insurance carriers. See Section 28.11, B and D Federal Jury Instructions for a model instructions on Withdrawal as a defense to conspiracy based on the Statute of Limitations derived from Pattern Criminal Jury Instructions

of the District Judges Association of the Sixth Circuit, No. 3.11c (1991).

Petitioner, of course, could not be convicted of a federal conspiracy if co-defendant Rocker could not; Rocker could not if he withdrew with mutual consent of petitioner, from the January, 1985 "buy-sell" contract *before* any federal conspiracy was completed by an overt act committed in support of that *federal* conspiracy.

During the trial, the district judge and both defense counsel entered into a colloquy over whether the defense desired the Withdrawal Instruction, and while it appeared that the Court thought it appropriate, defense counsel mysteriously (and petitioner asserts ineffectively) chose not to seek it. However, this begs the question whether the Court must sua sponte give it when the evidence has been presented to warrant the defense, and heralds the issue of 6th Amendment denial of the effective assistance of counsel when both defense counsel abdicated their duty in seeing that the jury made a resolution of this complete defense to the "federal conspiracy" that petitioner and co-defendant Rocker were convicted of. See *Strickland v. Washington*, 466 U.S. 668.

Certiorari should therefore, be granted to resolve the dual nationally important issues of

(a) whether the district judge must sua sponte instruct a federal criminal jury with a Withdrawal Instruction where evidence has been presented to support giving it, and

(b) whether criminal defendants in federal criminal trials are denied the effective assistance of counsel when defense counsel fail to insure that such withdrawal instructions are presented.

CONCLUSION

1. Because of the need to further explicate federal district judge disqualification under 28 U.S.C. 144 and 455(a) and (b), Certiorari should be granted.

2. Because of the need to further explicate the law of withdrawal from alleged federal conspiracies, and to determine that here no conspiracy to commit a federal crime ever existed, Certiorari should be granted.

3. To further define minimally effective assistance of counsel in federal criminal trials under the Vth and VIth Amendments, Certiorari should be granted.

Dated: April 30, 1994.

Respectfully submitted,

ROGER S. HANSON
Counsel to Petitioner
Paul Suren Mosesian
Member of the Bar
United States Supreme Court

APPENDIX "A"

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. PAUL SUREN MOSESIAN, Defendant-Appellant.	No. 91-10188 DC No. CR-90-00032-REC **MEMORANDUM*** (Filed Aug. 18, 1992)
UNITED STATES OF AMERICA, Plaintiff-Appellee v. LAWRENCE CLAY ROCKER, Defendant-Appellant	No. 91-10197 DC No. CR-90-00032-REC

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, District Judge, Presiding

Argued and Submitted February 13, 1992
San Francisco, California

Before: GOODWIN, FARRIS and POOLE, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appellants Paul Mosesian and Lawrence Rocker appeal their convictions on one count of conspiracy and four counts of mail fraud arising from a scheme to artificially inflate the value of a race horse in order to obtain increased mortality insurance proceeds. The defendants argue that (1) the district judge should have recused himself because his involvement in the case created an appearance of impropriety; (2) the conspiracy charges were barred by the statute of limitations; (3) they received inadequate assistance from their defense counsel; (4) the mail fraud prosecution was barred by the Tenth Amendment to the United States Constitution; (5) the district judge erroneously failed to provide an appropriate instruction to the jury and incorrectly admitted certain evidence; (6) the government did not meet its burden of proof as to all elements of the mail fraud charges; and (7) the district court improperly sentenced them pursuant to the United States Sentencing Guidelines. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the defendants' convictions and sentences.

I.

This case involves the tale of an investment gone sour and the disappointed risk-taker's resort to unlawful means to regain his lost dollars. The subject of the ill-fated investment, a quarter horse born to a sire known for his show and breeding prowess, died under suspicious circumstances. The owner used a sham sales agreement and the United States mail to convert this unfortunate happenstance into a device for securing a payback of his losses from the insurers of the animal.

Classy Doc Bar was born a foal of the famous quarter horse Doc Bar and a mare known as Classy Red in the spring of 1973. Doc Bar had produced other offspring that had been quite successful on the performance circuit, earning in excess of $ 50 million. Classy Doc Bar, however, failed to extend the winning tradition of his ancestry, earning $19.00 in 1974, $90.10 in 1975, nothing in 1976 and 1977, $301.34 in 1978, and $140.84 in 1979. Classy Doc Bar also did not prove to be a productive stallion, siring an average of less than six foals per year during his lifetime.[1] Owned by David and Frances Linder of Tulare, California between 1974-78 and by Francine Linder and Charles Allen between 1978-81, Classy Doc Bar was purchased by defendant Paul Mosesian in 1981 for $275,000. Mosesian launched several failed attempts between 1982-84 to improve Classy Doc Bar's breeding performance. In 1984, Mosesian decided that he could best recoup his investment by showing Classy Doc Bar. The horse earned $744.39 that year.

Mosesian's desire to find a way to improve Classy Doc Bar's profitability was apparently motivated by a rapid decline of the cutting horse market starting in 1984. Mosesian was paying back a $250,000 loan he had

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[1] An average stallion produces between 25-30 registered foals each year, and the other sons of Doc Bar produced 35-45 registered foals annually. Most of the foals produced by Classy Doc Bar were born during the years prior to 1981. In 1982, the horse produced four registered foals; in 1983, ten; and in 1984 and 1985, zero. Classy Doc Bar's offspring were not successful on the performance circuit. Only five of Classy Doc Bar's sixty registered offspring performed and they earned little money for their owners.

obtained to facilitate the purchase of the horse, and insurance premiums on the horse amounted to $20,000 per year. By the end of 1984, Mosesian had invested approximately $500,000 in Classy Doc Bar, but the horse's value had dropped to approximately $50,000. In November, 1984 Mosesian unsuccessfully attempted to increase the mortality insurance on Classy Doc Bar to a level above the then-$500,000 limit.

Shortly thereafter, in early January 1985, Mosesian informed insurance broker Ronald Dumm that he had sold the horse to defendant Lawrence Rocker for $750,000. Rocker was to pay $50,000 by February 1, 1985 and the balance over a ten year period. Mosesian instructed Dumm to obtain an additional $250,000 in insurance coverage and forwarded to him a purchase agreement and sales contract purportedly memorializing the Mosesian-Rocker transaction. Rocker applied for mortality insurance on Classy Doc Bar on January 21, 1985. Shortly thereafter, The Insurance Company of Ireland issued a policy providing additional coverage of $150,000 on the horse. Rocker also forwarded an application signed by himself and Mosesian for an additional $100,000 coverage on March 1, 1985, but Dumm never placed the application with insurance companies for approval. Thus, the total insured value of Classy Doc Bar after the purported sale to Rocker was $650,000.

The sale of Classy Doc Bar, however, was apparently no sale at all. Rocker's down payment of $50,000 was returned to Mosesian through a series of bank transfers between accounts held by the two defendants and several companies owned by them. In addition, contrary to a specific agreement in the sales contract, Rocker never

paid any of the premiums on the horse insurance policy. Mosesian paid $18,000 for insurance after the alleged sales contract was executed. Rocker also failed to pay any of the costs of boarding Classy Doc Bar and made no attempt to breed or show the horse. The value of Classy Doc Bar at the time of the purported sale to Rocker was between $25,000 and $75,000.

Classy Doc Bar died at a boarding stable in Tulare, California on April 11, 1985. The circumstances surrounding the horse's death were somewhat unusual, and its cause was indeterminable. Two veterinarians testified that Classy Doc Bar's death could not have resulted from natural causes and that the lack of any indication of a struggle by the horse was inconsistent with a hypothesis that pulmonary edema was responsible. After Classy Doc Bar's death Rocker made no attempt to collect the insurance proceeds; he admitted that he acted as if the sales contract did not exist as of the time the horse died. Rocker testified before the grand jury that between one month and six weeks after Classy Doc Bar's demise, he told Mosesian that "[he] didn't want no part of this," that he would not file an insurance claim, and that Mosesian should return his money. Mosesian, however, did attempt to collect insurance proceeds on Classy Doc Bar. His efforts included the mailing of four letters.

The first letter, dated May 20, 1985, was sent to Fred Whittet, an adjuster for the INA insurance company. INA had provided a $200,000 policy on Classy Doc Bar. Mosesian informed Whittet that a sale had occurred and that he had received the down payment from Rocker and included a proof of loss form, a copy of the purported Mosesian-Rocker sales agreement, and a copy of Rocker's

$50,000 down payment check. The second letter, dated May 21, 1985, was sent to Roger Mitchell, an adjuster for GAB Business Services, Inc. Mosesian requested that GAB forward the $200,000 proceeds on the INA policy to him and again enclosed photocopies of the Mosesian-Rocker agreement and the down payment check. The third letter was sent to Whittet on June 6, 1985. It stated that Mosesian believed that the company should pay on its policy based on the alleged sales price to Rocker and was accompanied by another copy of the down payment check. Whittet's response informed Mosesian that INA had ordered appraisals on Classy Doc Bar and requested the horse's breeding records, official show records, and information about the persons who had physical custody of Classy Doc Bar during Mosesian's ownership. On July 5, 1985, Mosesian advised Whittet that he did not possess the requested information and objected to the planned appraisals. The fourth letter was dated the same day and was sent to adjuster C.W. Jukes. It demanded payment of $150,000 in insurance proceeds and threatened litigation if the demand was not met within ten days. Shortly thereafter, Mosesian sued the insurance carriers; the law firm McCormick, Barstow, Sheppard, Wayte and Carruth; McCormick, Barstow partner Gordon Park; Dumm; and investigator William Graham in California state court. *See Mosesian v. Park*, No. 345940-1, Superior Court of California in and for the County of Fresno (filed February 13, 1989).

On March 8, 1990, a grand jury for the Eastern District of California indicted Mosesian and Rocker on four counts of mail fraud, 18 U.S.C. § 1341, and one count each of conspiracy to commit mail fraud, 18 U.S.C. § 1871, and

aiding and abetting mail fraud, 18 U.S.C. § 2. Both defendants were convicted on all counts on December 20, 1990. On April 8, 1991, Mosesian was sentenced to thirty months in federal prison and to pay a $15,000 fine and Rocker was sentenced to serve twenty four months in federal prison. The defendants timely appealed.

II.

Mosesian and Rocker contend that Judge Coyle's ties to his former law firm, which was a defendant in the civil case related to Classy Doc Bar's death filed by Mosesian; his investments with his former law partners; his social relationships with colleagues in private practice;, and his prior involvement in contentious litigation opposite Mosesian required recusal under 28 U.S.C. §§ 455(a), (b)(1), (b)(2), (b)(4), and (b)(5)(iii). "Disqualification . . . is generally a matter confided to the conscience of the particular judge." *Margoles v. Johns*, 660 F.2d 291, 299 (7th Cir. 1981) (quoting *Weiss v. Hunna*, 312 F.2d 711, 714 (2d Cir.), *cert. denied*, 374 U.S. 853 (1963)), *cert. denied*, 455 U.S. 909 (1982). Accordingly, we review a district judge's refusal to recuse himself for an abuse of discretion. *E. & J. Gallo Winery v. Gallo Cattle Co.*, slip op. 6917, 6944 (9th Cir., June 22, 1992); *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986). We are not persuaded that Judge Coyle was obligated to recuse himself in this case.[2]

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[2] Although Rocker apparently did not join Mosesian's recusal motion in the district court, we reach the merits of the issue because Mosesian indisputably raised the question in the district court and its resolution is necessary to the disposition of Mosesian's appeal. In any event, we have previously held that

28 U.S.C. § 455(a) provides as follows:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The statute covers situations in which there appears to be a conflict of interest, regardless of whether there is any actual bias on the part of the judge. *Preston v. United States*, 923 F.2d 731, 733 (9th Cir. 1991) (quoting *Herrington v. Sonoma County*, 834 F.2d 1488, 1502 (9th Cir. 1987), *amended*, 857 F.2d 527 (1988), *cert. denied*, 489 U.S. 1090 (1989)). *Recusal is required if a reasonable person, knowing all of the relevant facts, would expect the judge to know of circumstances creating an appearance of* partiality. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 861 (1988); *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 870 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1667 (1992). 28 U.S.C. § 455(b) sets forth specific situations where a judge's impartiality is presumed to be impaired and requires recusal if any of the specific conditions are present. *United States v. Conforte*, 624 F.2d 869, 880-81 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980).

A. Judge Coyle's Former Association with McCormick, Barstow

28 U.S.C. § 455(b)(2) prohibits a judge from hearing a case where he previously served as a lawyer in the matter

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failure to raise the issue of recusal in the trial court does not prevent pursuit of the question on appeal. *Noli v. Commissioner*, 860 F.2d 1521, 1527 (9th Cir. 1988).

or where a partner or associate during any prior period of practice served as a lawyer on the matter during the judge's association with him or her. Thus, under certain circumstances a judge should recuse himself if his former firm may be benefited or harmed by the outcome of a particular proceeding. *See Preston*, 923 F.2d at 735. However, the recusal requirement is triggered only if the judge's former firm represented a party to *this litigation* in the same or a related matter during the time the judge was associated with it. *Id.* at 734. Obviously Mosesian cannot contend that McCormick, Barstow represented either the government or either defendant during Judge Coyle's tenure at the firm.

Even if we could consider the parties involved in the state court proceeding as part of the section 455(b)(2) specification, Mosesian does not allege that McCormick, Barstow represented any of the insurance companies who were the victims of Mosesian's scheme during Judge Coyle's tenure at the firm. Judge Coyle was not obligated to recuse himself because this case could result in some benefit to his former partners or their clients. *See Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984) (district judge's former partnership with defendant's lawyer does not require recusal), *cert. denied*, 470 U.S. 1028 (1985); *National Auto Brokers v. General Motors Corp.*, 572 F.2d 953, 958 (2d Cir. 1978) (affirming denial of recusal motion where district judge had been previously associated with firm now representing defendant), *cert. denied*, 439 U.S. 1072 (1979).

B. Judge Coyle's Investments

The outcome is not different because Judge Coyle holds personal investments with some members of the McCormick, Barstow firm. 28 U.S.C. § 455(b)(4) requires a judge to abstain from hearing a case if

> [h]e knows that he, individually or as a fiduciary, . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

28 U.S.C. § 455(b)(5)(iii) mandates recusal if

> [the judge] . . . know[s that he] ha[s] an interest that could be substantially affected by the outcome of the proceeding.

There is no allegation that Judge Coyle holds any financial interest *in the horse at issue* in this case or in the parties. Thus, recusal under this provision would be necessary only if Judge Coyle had some "other interest" that would be "substantially affected" by the outcome of the government's case against Mosesian and Rocker. *See In re Cement Antitrust Litigation*, 515 F. Supp. 1076, 1078 (D. Ariz. 1981), *mandamus denied*, 688 F.2d 1297 (9th Cir. 1982), *aff'd sub nom., Arizona v. United States District Court*, 459 U.S. 1191 (1983). Mosesian has not identified the members of the McCormick, Barstow firm with which Judge Coyle is alleged to have personal investments. Nor has Mosesian alleged that Judge Coyle holds investments with Gordon Park, who represents the insurance companies sued by Mosesian in state court and who is himself a defendant in that state court action. This case is therefore not governed by the rule forbidding a judge to

preside where his business partner represents a party that stands to be directly benefited by the proceeding at issue. *See Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1110-1111 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980); *Levin v. Weissman*, 594 F. Supp. 322, 330 n.17 (E.D. Pa. 1984), *aff'd*, 760 F.2d 258 (3d Cir. 1985). And there has been no allegation that any of the McCormick, Barstow members represent or have represented Judge Coyle in any unrelated proceeding. *See Potashnik*, 609 F.2d at 1111.

Mosesian offers a vague allegation that the profits earned by Judge Coyle through his investments with his former law partners will increase if the conviction in this case stands. He asserts that a government victory here will aid the insurance companies in the state court case, which in turn will increase the fees or profits earned by McCormick, Barstow. Some of those increased profits would be invested by Judge Coyle's former partners in thecommon venture, which could possibly inure to the benefit of the district judge. We think this imagined scenario is nothing more than a "trivial or insignificant matter[] that merely furnish[es a] springboard[] for speculation." *Margoles*, 660 F.2d at 298. That is not enough to require recusal. *Id.; In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988) (A "remote, contingent, or speculative interest" does not reasonably bring into question a judge's impartiality) (citing *In re Placid Oil Co.*, 802 F.2d 783, 787 (5th Cir. 1986)), *cert. denied sub nom., Milken v. SEC*, 490 U.S. 1102 (1989).

C. Judge Coyle's Social Relationships

The Judge's social contacts with his former colleagues in practice is likewise an insufficient ground for recusal. For such relationships to mandate disqualification, the judge must be at risk of creating an appearance of personal bias. *See United States v. Alabama*, 582 F. Supp. 1197, 1203-04 (N.D. Ala. 1984), *aff'd*, 762 F.2d 1021 (11th Cir. 1985). Defendants do not contend that Judge Coyle was at risk of bias because of friendships with counsel in this case; they instead assert that recusal is necessary because Judge Coyle conducts social relationships with former colleagues representing the insurance companies in the state civil case.

We reject this argument. A district judge is not a "sterile creature[] who don[s] judicial robes without any prior contacts in the community but rather [is] very likely to be [a] m[a]n [or] wom[a]n with a broad exposure to all kinds of citizens of all shades of persuasion and background." *In re Searches Conducted on March 5, 1980*, 497 F. Supp. 1283, 1290 (E. D. Wis. 1980). A judge is not required to forsake established friendships and professional relationships with members of the bar just because he has taken a seat on the bench. Absent a concrete allegation that Judge Coyle could directly and personally benefit from the success his friends and professional colleagues may enjoy in litigating the state civil case no reasonable person would believe that Judge Coyle's social contacts with his former partners calls into doubt his impartiality in this case.

D. Other Arguments for Recusal

Mosesian claims that "contentious litigation" between him and Judge Coyle when Judge Coyle was engaged in the practice of law indicates that bias requiring recusal under 28 U.S.C. § 455(b)(l) is present. We disagree. Defendants have not contended that Judge Coyle maintains hostility toward either of them or that Judge Coyle ever engaged in any unfair or improper conduct in any of the cases where he served as opposing counsel to Mosesian. But personal bias means that the judge holds "an attitude or state of mind that belies an aversion or hostility of the kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes." *Conforte*, 624 F.2d at 881. Such animus is not present merely because the judge disapproves of a person's prior conduct or methods. *See In re Yagman*, 796 F.2d 1165, 1182 (9th Cir.), *modified*, 803 F.2d 1085 (1986), *mandamus granted*, 815 F.2d 575, *cert. denied*, 484 U.S. 963 (1987). Judge Coyle's disapproval of Mosesian's style as a practicing attorney does not convert the Judge's prior contacts with Mosesian into a bias that would be a basis for recusal. *See id.; In re Cooper*, 821 F.2d 833, 838 (1st Cir. 1987).

Mosesian's argument that Judge Coyle's familiarity and involvement with earlier bar proceedings against him also fails to require recusal. *See Mayes v. Leipziger*, 729 F.2d 605 (9th Cir. 1984) (judge who has previously entered rulings adverse to a party is not obligated to recuse himself in later cases where that party is again before him); *Sewer Alert Comm. v. Pierce County*, 791 F.2d 796 (9th Cir. 1986) (previous acquaintance with defendant and residence in county not enough to require recusal).

III.

Mosesian and Rocker argue that the conspiracy prosecution in this case was barred by the five-year statute of limitations set forth by 18 U.S.C. § 3282. It is not apparent that either defendant raised the statute of limitations issue before trial or the judgment of conviction, as required by *United States v. DeTar*, 832 F.2d 1110, 1115 (9th Cir. 1987). However, even if the defendants did raise the issue in the trial court, their argument is undermined by the facts.

The indictment was filed on March 9, 1990, and the record indicates that at least one overt act occurred after March 9, 1985.[3] Because the statute of limitations runs from the date of the last overt act, the indictment was timely. *See Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *United States v. Butler*, 792 F.2d 1528, 1532-33 (11th Cir.), *cert. denied sub nom., Waites v. United States*, 479 U.S. 933 (1986); *United States v. Parker*, 586 F.2d 422 (5th Cir. 1978), *cert. denied*, 441 U.S. 962 (1979); *cf. Venegas v. Wagner*, 704 F.2d 1144, 1146 (9th Cir. 1983) (applying rule to civil conspiracy complaint), *disapproved on other grounds, Wilson v. Garcia*, 471 U.S. 261 (1985).

Rocker argues that the statute of limitations bars prosecution of him because his involvement in the conspiracy ended before March 9, 1985, which is the date five years prior to the date of the indictment. However, it is

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[3] On July 5, 1985 Mosesian mailed the last demand letter to an insurer.

well-settled that an attempt to withdraw from a conspiracy is not effective if the defendant has already performed an overt act furthering the conspiracy. *United States v. Luttrell*, 889 F.2d 806, 810 (9th Cir. 1989), *vacated in part on other grounds and amended*, 923 F.2d 764 (1991) (en banc), *cert. denied sub nom., Kegley v. United States*, 112 S.Ct. 1558 (1992); *United States v. Sarault*, 840 F.2d 1479, 1487 (9th Cir. 1988). Here, Rocker entered into the purported sales contract and participated in the money transfer scheme designed to secure the return to him of his purported down payment money before the alleged withdrawal occurred.[4] The government's complaint against Rocker was not barred by the statute of limitations.

IV.

Both defendants argue that they were provided inadequate assistance of trial counsel. We decline to address the merits of this claim because it must ordinarily be raised in a collateral proceeding brought pursuant to 28 U.S.C. § 2255. *United States v. Robinson*, slip op. 6667, 6673 (9th Cir., June 15, 1992) (citing *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985)); *United States v. Pope*, 841 F.2d 954, 958 (9th Cir. 1988).

We make an exception to this general rule where the defendant has obviously been denied his right to the effective assistance of his defense attorney. *Robinson*, slip

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[4] For the same reason we reject Rocker's contention that it was an abuse of discretion for the district judge to refuse to instruct the jury on withdrawal.

op. at 6673 (citing *United States v. Rewald*, 889 F.2d 836, 859 (9th Cir. 1989), *amended*, 902 F.2d 18, *cert. denied*, 111 S.Ct. 64 (1990)). However, the grounds offered to support the claim in this case – a failure to seek a withdrawal instruction and a failure to seek dismissal due to the expiration of the statute of limitations – do not support application of the exception. Because Rocker never legally withdrew from the conspiracy and the statute of limitations did not expire before the indictment was brought, defense counsel did not commit any material and prejudicial error. Thus, the *Rewald* exception does not apply.

V.

Both defendants argue that the Tenth Amendment bars the federal prosecution for mail fraud in this case since the insurance companies never actually paid Mosesian or Rocker the insurance proceeds sought through the scheme to defraud. We have previously rejected a similar argument. *See United States v. Von Stephens*, 774 F.2d 1411 (9th Cir. 1985) (welfare fraud prosecution). Congress' reliance upon the Constitution's Postal Clause, Art. I, § 8, cl. 7, and the Necessary and Proper Clause, Art. I., § 8, cl. 18, to protect the Postal Service from misuse of the mail insulates the prosecution from the strictures of the Tenth Amendment. This is so regardless of whether the defendant's scheme is ultimately successful. *United States v. Rendini*, 738 F.2d 530, 533 (1st Cir. 1984).

VI.

Mosesian contends that Judge Coyle erred by failing to give *sua sponte* an instruction cautioning the jury about his out-of-court statements. Mosesian seeks the instruction with respect to the testimony of government witness Ronald Dumm, who testified as follows:

> . . . I also said that I thought that if there was – if the horse died – that we would have a problem justifying $500,000. I remember [Mosesian] saying not to worry about the [expletive] insurance companies, that he had either been screwing or screwing with insurance companies for a long time.

Mosesian does not contend that Dumm's statement was involuntarily made or identify any other factual basis for giving a cautionary instruction. Absent such a factual showing the district judge does not err in failing to provide a cautionary instruction.[5] *See United States v. Maher*, 645 F.2d 780, 783 (9th Cir. 1981) (per curiam) (court not obligated to hold hearing on voluntariness issue if not timely dispute as to that issue is raised).

In any event, however, we do not require a cautionary instruction where "there was ample evidence, independent of the challenged admission[], linking [the defendant] to the crime." *United States v. Williams*, 428

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[5] *United States v. Blue Horse*, 856 F.2d 1037, 1040 (8th Cir. 1988); *United States v. Sebetich*, 776 F.2d 412, 422 (3d Cir. 1985), *cert. denied*, 484 U.S. 1017 (1988); *United States v. McLernon*, 746 F.2d 1098, 1118. (6th Cir. 1984); *United States v. Bondurants*, 689 F.2d 1246, 1249-50 (5th Cir. 1982); *United States v. Groce*, 682 F.2d 1359, 1366 (11th Cir. 1982): *United States v. Fera*, 616 F.2d 590, 594-95 (1st Cir.), *cert. denied*, 446 U.S. 969 (1980).

F.2d 365, 366 (9th Cir. 1970), *cert. denied*, 402 U.S. 985 (1971). Here, the government introduced substantial other evidence linking the defendants to the conspiracy, including the letters to the insurance adjusters, the allegedly sham contract, and the evidence probative of the money transfers of Rocker's purported down payment check.

VII.

Both defendants contend that Judge Coyle erroneously admitted evidence demonstrating that Mosesian had invested nearly $500,000 in Classy Doc Bar, that the market value of the horse was rapidly declining, and that the insurance contracts entered into by the defendants would have entitled Mosesian to the proceeds in the event of the horse's death. We review evidentiary decisions for an abuse of discretion. *United States v. Catabran*, 836 F.2d 453, 456 (9th Cir. 1988).

The Federal Rules of Evidence favor admission of evidence with any probative value. *United States v. Carranco*, 551 F.2d 1197, 1200 (10th Cir. 1977). The cause of the horse's death was unexplained, and an inference of fraudulent intent may be drawn from suspicious events occurring prior to an attempt to recover insurance proceeds. *See Mississippi Lofts, Inc. v. Lexington Ins. Co.*, 841 F.2d 251, 253-54 (8th Cir. 1988). The evidence of the horse's death was therefore probative because it tended to corroborate the existence of the fraudulent sale scheme. The circumstantial nature of the evidence is not sufficient to mandate suppression. *United States v. Toliver*,

541 F.2d 958, 966 (2d Cir. 1976) (scheme to defraud must frequently be proven by circumstantial evidence).

Evidence of the circumstances of Classy Doc Bar's demise could have been suppressed pursuant to Fed. R. Evid. 403 if its prejudicial impact outweighed its probative value. Defendants seize on that possibility, asserting that since the death of the horse was not an element of the offense charged in the indictment, any evidence about the event was likely to confuse the jury and inappropriately waste time. However, there is a difference between an element of an alleged crime and evidence tending to prove that the alleged crime occurred. The evidence indicating the unexplained demise of the horse could support an inference that Mosesian's attempt to secure the insurance proceeds was fraudulent. Thus, it was probative, and while some possibility of confusion may have existed, Judge Coyle instructed the jury that the government did not have to prove that Classy Doc Bar died at defendants' hand to secure a conviction on the charges. We find no abuse of discretion in the admission of the evidence.

VIII.

Both defendants argue that the government failed to prove all of the elements of mail fraud because it did not demonstrate that the mailings were likely to further the fraudulent scheme. Defendants rely on the insurers reservation of the right to perform an independent appraisal before paying out any proceeds. We must affirm the defendants' mail fraud convictions if any rational jury could find that the government met its burden of proof as

to each element of the crime. *Luttrell*, 889 F.2d at 809. A jury could easily so conclude in this case.

To secure a conviction for a violation of 28 U.S.C. § 1341, the government must prove beyond a reasonable doubt that the defendant (1) formed a scheme to defraud and (2) used the mails in furtherance of the scheme. *United States v. Kellogg*, 955 F.2d 1244, 1247 (9th Cir. 1992); *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir.), *cert. denied*, 447 U.S. 428 (1980), *disapproved on other grounds, McNally v. United States*, 483 U.S. 350 (1987). The defendants argue that the ultimate failure of the mailings to secure the success of the scheme renders the government's case inescapably flawed. This argument fails to undermine the government's case, however, because the mailings need only be for the purpose of furthering a scheme to defraud. There is no requirement that the mailings be an essential component of the defendant's criminal plan. *Bohonus*, 628 F.2d at 1173; *United States v. Utz*, 886 F.2d 1148, 1149 (9th Cir. 1989) (a scheme to defraud need not be successful to be the basis of a mail fraud prosecution), *cert. denied*, 110 S.Ct. 3242 (1990).[6]

Defendants attempt to avoid this rule by alternatively arguing that their mailings *could not have persuaded* the insurers to pay. This argument is unpersuasive

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[6] For the same reason we reject defendants' argument that the indictment was defective. The sufficiency of an indictment is reviewed de novo, *United States v. Ahumada-Avalos*, 875 F.2d 681, 683 (9th Cir.), *cert. denied*, 493 U.S. 837 (1989), and it was adequate because it alleged both of the elements of mail fraud. The indictment did not have to allege that the government would prove that defendants caused the death of Classy Doc Bar.

because the government need only prove that the defendants intended to induce reliance, not that the victims of the scheme actually would have relied on the mailed documents.[7] *Kellogg*, 955 F.2d at 1247; *United States v. Halbert*, 712 F.2d 388, 390 (9th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). Mail fraud convictions involving conduct very similar to that of these defendants have been affirmed by other courts. *See United States v. Serino*, 835 F.2d 924 (1st Cir. 1987) (defendant submitted proof of loss forms falsely inflating amount of investment in bar that had been burned by an arsonist); *United States v. Rodolitz*, 786 F.2d 77 (2d Cir.) (defendant created false paper trail in an attempt to show that he had spent over $1,000,000 on a building damaged in a windstorm), *cert. denied*, 479 U.S. 826 (1986); *United States v. Cady*, 567 F.2d 771 (8th Cir. 1977) (conviction affirmed where defendant sent inflated medical bills in attempt to secure greater proceeds on personal injury claims), *cert. denied*, 435 U.S. 944 (1978). We find no deficiency in the government's proof.[8]

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[7] We are not convinced that the mailings could have had no effect on the insurers. Upon Classy Doc Bar's death the insurers had to determine the actual cash value of the horse. The actual cash value is defined by market value, which in turn depends upon the price a willing buyer would pay to a willing seller. *Jefferson Ins. Co. v. Superior Court*, 3 Ca1.3d 398, 402, 475 P.2d 880, 90 Cal. Rptr. 608 (1970). Insurers obtain market value by looking to sales of comparable insured items. *See, e.g., County of Los Angeles v. McDonnell Douglas Corp.*, 219 Cal. App. 3d 715, 724-25, 268 Cal. Rptr. 294 (1990). Information about a recent sale would accordingly be very helpful to an insurer faced with the task of establishing the value of a horse.

[8] Defendants' argument that the district judge erroneously instructed the jury on the elements of mail fraud cannot be entertained because they have not asserted that the instructions

IX.

Defendants' final contention is that they should not have been sentenced pursuant to the Sentencing Guidelines. They argue that since the conspiracy ended on January 15, 1985 - the date of the creation of the sham contract - the Guidelines are inapplicable. *See United States v. Rewald*, 835 F.2d 215, 216 (9th Cir. 1987) (Guidelines apply to offenses committed after November 1, 1987). We review *de novo* the application of the Sentencing Guidelines. *United States v. Kohl*, slip op. 9713, 9717 (9th Cir., Aug. 12, 1992); *United States v. Howard*, 894 F.2d 1085, 1087 (9th Cir. 1990).

The district court found that the conspiracy in this case continued beyond the Guidelines effective date of November 1, 1987. This factual finding must be upheld unless clearly erroneous. *United States v. McConney*, 728 F.2d 1195, 1200 n.5 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). The court rested its finding in part upon a letter Rocker had written to the FBI in December 1987 asserting an explanation for Rocker's failure to follow through on the sales contract after the death of Classy Doc Bar. Rocker denies that he ever wrote such a letter, contending instead that Mosesian had done so. Mosesian asserts that the letter was intended as a private communication between Rocker and himself, but he does not

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taken as a whole are misleading or erroneous. *See United States v. Beltran-Rioss*, 878 F.2d 1208, 1214 (9th Cir. 1989). Defendants' object mainly to the language employed. That is not a basis for reversal. *United States v. Wellington*, 754 F.2d 1457, 1463 (9th Cir.), *cert. denied sub nom., Utz v. United States*, 474 U.S. 1032 (1985).

explain why it was addressed to the FBI. These allegations are insufficient to cast doubt on the accuracy of the finding that the conspiracy continued beyond the November 1, 1987 effective date.

A conspiracy "straddling" the November 1, 1987 effective date of the Guidelines is subject to their strictures. *Kohl*, slip op. at 9720. Accordingly, the district court did not err in sentencing Mosesian and Rocker pursuant to the Sentencing Guidelines.

X.

The convictions and sentences are AFFIRMED.

APPENDIX "B"

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. PAUL SUREN MOSESIAN, Defendant-Appellant.	No. 91-10188 DC No. CR-90-00032-REC (Filed Feb. 7, 1994) No. 91-10197 DC No. CR-90-00032-REC **ORDER**
UNITED STATES OF AMERICA, Plaintiff-Appellee v. LAWRENCE CLAY ROCKER, Defendant-Appellant	

Before: GOODWIN, FARRIS and POOLE, Circuit Judges.

1. The government's motion for recall of mandate and for reconsideration of order granting appellant's petitions for rehearing is GRANTED.

2. The mandate, issued October 12, 1993, is RECALLED.

3. The order of October 4, 1993, granting the appellants' petitions for rehearing and modifying the memorandum disposition is VACATED.

4. Upon reconsideration, the panel has voted to deny appellant's petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing are DENIED and the suggestions for rehearing en banc are REJECTED.

5. The memorandum disposition, filed August 18, 1992, is modified as follows:

Parts IX and X of the memorandum, on pages 22-23, are replaced with the following:

IX.

Defendants' final contention is that they should not have been sentenced pursuant to the Sentencing Guidelines. They argue that since the conspiracy ended on January 15, 1985 – the date of the creation of the sham contract – the Guidelines are inapplicable. *See United States v. Rewald*, 835 F.2d 215, 216 (9th Cir. 1987) (Guidelines apply to offenses committed after their effective date of November 1, 1987); *cf. United States v. Kohl*, 972 F.2d 294, 298 (9th Cir. 1992) (a conspiracy "straddling" the November 1, 1987 effective date is subject to their strictures).

We review *de novo* the district court's application of the Sentencing Guidelines. *Kohl*, 972 F.2d at 297; *United States v. Howard*, 894 F.2d 1085, 1087 (9th Cir. 1990). Underlying factual findings are upheld unless clearly erroneous. *United States v. McConney*, 728 F.2d 1195, 1200 n.5 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

The district court found that the conspiracy in this case continued beyond the Guidelines' effective date of November 1, 1987. The basis for this finding is unclear. The court stated only that "the crime was committed during the time of the Guidelines through the November date." This finding may have come from a reference in the presentence report to a December 1987 letter sent by Rocker to the F.B.I. concerning the conspiracy.

But the presentence report was in error. The record did not contain a letter from Rocker to the F.B.I. in December 1987. There was a letter from Mosesian to Rocker dated December 2, 1987, concerning refund of Rocker's initial $50,000 payment for the horse. We have no way to know whether the district court's finding was based on this letter, the mistaken description in the presentence report, or some other evidence. Accordingly, we must remand the case to the district court for factual findings and legal conclusions concerning whether the conspiracy continued past November 1, 1987. If so, the Sentencing Guidelines will apply; otherwise, a pre-Guidelines sentence is called for.

X.

The convictions are AFFIRMED. The sentences are VACATED, and the case is REMANDED for further factfinding on the duration of the conspiracy and for resentencing in accordance therewith.

APPENDIX "C"

Pages 231B and 232B of the Martindale-Hubbell Law Directory list *Stephen Barnett, Stephen Cornwell, Michael G. Woods* and *Gordon M. Park* as *partners* in the McCormick, Barstow firm.

TIMOTHY V. MAGILL, born Terre Haute, Indiana, September 14, 1952; admitted to bar, 1978, California and U.S. District Court, Eastern District of California; 1980, U.S. Court of Appeals, Ninth Circuit; 1981, U.S. District Court, Central District of California; 1982, U.S. District Court, Northern District of California; 1983, U.S. Supreme Court. *Education:* California State University at Hayward (B.A., 1974); San Joaquin College of Law (J.D., 1978). *Member:* Fresno County Bar Association; State Bar of California; California Trial Lawyers Association (Board of Directors); Fresno Trial Lawyers Association (President, 1989-1991).

MARDEROSIAN, SWANSON & OREN

A PROFESSIONAL CORPORATION

1260 FULTON MALL

FRESNO, CALIFORNIA 93721-1783

Telephone: 209-441-7991

Facsimilie: 209-441-8170

Insurance Defense including Products Liability Defense, Insurance Bad Faith Defense and Personal Injury Law.

C. SAM TITUS (1957-1990).

MICHAEL G. MARDEROSIAN, born Fowler, California, August 30, 1950; admitted to bar, 1977, California. *Education:* University of California at Berkeley (B.A., 1973); San Joaquin College of Law (J.D., 1977). *Member:* Fresno County Bar Association; State Bar of California; Northern California Defense Counsel Association; Defense Research Institute; American Board of Trial Advocates. ***CONCENTRATION:*** Insurance Defense; Bad Faith; Personal Injury.

JAMES W. SWANSON, born Rochester, Minnesota, October 8, 1946; admitted to bar, 1977, California. *Education:* California State University at Fresno (B.S., 1972; M.S., 1973); San Joaquin College of Law (J.D., 1977). Instructor, Department of Criminology, California State University at Fresno, 1977-1983. *Member:* Fresno County Bar Association; State Bar of California; Northern California Association of Defense Counsel. [Sgt. Military Police, U.S. Army, 1967-1969]. ***CONCENTRATION:*** Insurance Defense; Bad Faith; Personal Injury.

ERIC P. OREN, born Merced, California, August 23, 1956; admitted to bar, 1982, California. *Education:* University of California at Los Angeles (B.A., 1978); Western State University (J.D., 1982). *Member:* Fresno County Bar Association; State Bar of California; Association of Defense Counsel of Northern California. ***CONCENTRATION:*** Insurance Defense; Bad Faith; Personal Injury.

BRETT L. RUNYON, born Fresno, California, October 10, 1959; admitted to bar, 1988, California. *Education:* Fresno City College (A.A., 1981); Fresno State University (B.S., 1982); San Joaquin College of Law (J.D., 1986). Delta Theta Phi. *Member:* Fresno County Bar Association; State Bar of California; Association of Defense Counsel of Northern California. ***CONCENTRATION:*** Insurance Defense; Bad Faith; Personal Injury.

ALAN M. SIMPSON, born Fresno, California, August 1, 1955; admitted to bar, 1986, California. *Education:* Fresno City College (A.A., 1975); California State University at Fresno (B.A., 1977); San Joaquin College of Law (J.D., 1983). *Member:* State Bar of California. ***CONCENTRATION:*** Insurance Defense; Bad Faith; Personal Injury.

WARREN R. PABOOJIAN, born Fresno, California, May 18, 1957; admitted to bar, 1987, California. *Education:* California State University at Fresno (B.A., 1980); San Joaquin College of Law (J.D., 1985). Editor: DICTA, 1982. *Member:* Fresno County Bar Association; State Bar of California; Association of Defense Counsel of Northern California. ***CONCENTRATION:*** Insurance Defense; Bad Faith; Personal Injury.

RICHARD H. MONGE, born Fairbanks, Alaska, August 31, 1954; admitted to bar, 1989, California. *Education:* Canada College; Fresno City College (A.A., 1985); San Joaquin College of Law (J.D., 1989). Delta Theta Phi. *Member:* Fresno County and American Bar Associations; State Bar of California. ***CONCENTRATION:*** Insurance Defense; Bad Faith; Personal Injury.

SUE ANN CERCONE, born Billings, Montana, April 22, 1955; admitted to bar, 1989, California. *Education:* Colorado State Univerity (B.A., 1977); San Joaquin College of Law (J.D., 1989). *Member:* Fresno County, Kings County and American Bar Associations; State Bar of California. ***CONCENTRATION:*** Insurance Defense; Bad Faith; Personal Injury.

(This Listing Continued)

REPRESENTATIVE CLIENTS: Liberty Mutual Insurance Co.; United States Fidelity Insurance Co.; Commercial Union Insurance Co.; Pacific National Insurance Co.; Allianz Insurance Co.; Wausau Insurance Co.; Hanover Insurance Co.; Atlantic Insurance Co.; Guaranty National Insurance Co. Merced Mutual Insurance Co.; Sequoia Insurance Co.; Industrial Indemnity Co.; City of Fresno, General Corp.; United Pacific Reliance; Allstate; CIGNA; Ohio Casualty Group.

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH

1331 FULTON MALL

FRESNO, CALIFORNIA 93721

Telephone: 209-442-1150

Telecopier: 209-442-1772

General Civil and Trial Practice. Banking, Corporate, Probate, Securities, Taxation, Estate Planning, Health Care Law, Agricultural and Water Law, Municipal Law, Construction, Bankruptcy (Debtor and Creditor Practice), Franchising, Real Estate, Business, Civil Rights Litigation and Environmental and Insurance Law.

MEMBERS OF FIRM

RICHARD A. MCCORMICK (1915-1981).

STEPHEN BARNETT (1931-1988).

LAWRENCE E. WAYTE, born San Mateo, California, November 4, 1936; admitted to bar, 1962, California. *Education:* Stanford University (A.B., 1958); Hastings College of Law, University of California (J.D., 1961). Phi Delta Phi. Law Clerk, Justice Frederick E. Stone, California 5th District Court of Appeals, 1961-1962. Deputy District Attorney, Fresno County, California, 1963. *Member:* Fresno County and American Bar Associations; The State Bar of California; Association of Defense Counsel; American Board of Trial Advocates (Advocate); International Association of Defense Counsel. Fellow, American College of Trial Lawyers.

LOWELL T. CARRUTH, born Oakland, California, April 11, 1938; admitted to bar, 1963, California. *Education:* Stanford University (A.B., magna cum laude, 1959), Phi Beta Kappa; University of California at Berkeley (LL.B., 1962). Phi Delta Phi. Associate Editor, California Law Review, 1961-1962. Deputy District Attorney, Fresno County, California, 1964-1966. *Member:* Fresno County (Secretary, 1964) and American Bar Associations; The State Bar of California; Association of Defense Counsel (President, 1982; 1st Vice President, 1981; 2nd Vice President, 1980; Secretary-Treasurer, 1979); American Board of Trial Advocates (Advocate; President San Joaquin Valley Chapter, 1973-1974). Fellow, American College of Trial Lawyers. [Capt., U.S. Army Reserve, 1964-1968]

JAMES H. PERKINS, born Sacramento, California, April 30, 1928; admitted to bar, 1954, California. *Education:* Stanford University (A.B., 1950); Stanford Law School (J.D., 1953). Phi Delta Phi. *Member:* Fresno County and American Bar Associations; The State Bar of California (Member, Executive Council, Conference of Barristers, 1963); Fresno Estate Planning Council (President, 1977-1978). Fellow, American College of Trust and Estate Counsel. (Certified Specialist, Probate, Estate Planning and Trust Law, The State Bar of California Board of Legal Specialization).

STEPHEN R. CORNWELL, born Berkeley, California, February 12, 1942; admitted to bar, 1967, California; 1975, U.S. Supreme Court; U.S. District Court, Eastern, Central and Northern Districts of California. *Education:* San Jose State College (B.S., 1964); Boalt Hall School of Law, University of California at Berkeley (J.D., 1967). Deputy District Attorney, Ventura County, 1967-1970. Judicial Arbitrator. *Member:* Fresno County (Member, Board of Directors, 1973-1978; Officer, 1973-1974) and American (Member, Sections on Tort Law and Litigation) Bar Associations; American Board of Trial Advocates (Member, National Board of Directors, 1973-1978; Advocate rank); Northern California Association of Defense Counsel (Member, Board of Directors, 1990—); Federation of Insurance Counsel.

ANDREW W. WRIGHT, born St. John, New Brunswick, Canada, September 4, 1946; admitted to bar, 1972, California. *Education:* Claremont Men's College (B.A., magna cum laude, 1968); Stanford Law School (J.D., 1971). Member, Panel of Arbitrators, American Arbitration Association. *Member:* Fresno County (Past Chairman, Business Law Section) and American Bar Associations; The State Bar of California.

MARIO LOUIS BELTRAMO, JR., born San Francisco, California, February 4, 1947; admitted to bar, 1972, California. *Education:* University of San Francisco (B.A., 1969); University of Notre Dame (J.D., cum laude, 1972). Administrative Editor, Vol. 47, Notre Dame Lawyer, 1971-1972.

(This Listing Continued)

APPENDIX "D"

1. Federal Judge Coyle and his wife, and law partner Michael Gary Woods and his wife Susan and law partner Stephen Barnett are tied together as investors in a Deed of Trust recorded June 16, 1981.

2. Federal Judge Coyle and his wife and law partner Stephen Barnett are tied together in several investments, including a Partnership Grant Deed recorded December 31, 1985, August 8, 1986.

The McCormick, Barstow law firm, as well as Gordon Park, a partner in that firm are defendants in the Mosesian v. Park, et al. suit in Fresno Superior Court.

Park and the law firm represent INA, one of the carriers for the equine mortality policy on Classy Doc Bar.

FRESNO COUNTY RECORDERS OFFICE

BEST AVAILABLE COPY

Submitted for Recordation
By and Return to

BANK OF AMERICA
NATIONAL TRUST AND SAVINGS ASSOCIATION
Office Address: Fashion Fair #1014
City: 590 East Shaw
State: Fresno, CA
Zip: 93710

RECORDED AT REQUEST OF
Title Insurance & Trust Co.
AT — MIN. PAST 8 A M
62968 JUL 15 1981
FRESNO COUNTY, CALIFORNIA
GALEN LARSON, County Recorder
BY DEPUTY RECORDER
TR 12

Kerman
Grantee?
Book 7754 page 253
Thompson?

SPACE ABOVE THIS LINE FOR RECORDER'S USE

This Deed of Trust, made this 16th day of June, 19 81,

AMONG FOURTEEN TRUSTORS LISTED ON THE REVERSE SIDE AND/OR EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF, as TRUSTOR

("Trustor" to be interpreted as "Trustors" where context requires), CONTINENTAL AUXILIARY COMPANY, a California corporation, as TRUSTEE, and BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, as BENEFICIARY,

WITNESSETH: That Trustor IRREVOCABLY GRANTS, TRANSFERS and ASSIGNS to TRUSTEE, IN TRUST, WITH POWER OF SALE, the following described property situate in the City of Kerman, County of Fresno, State of California, to wit:

PARCELS 1 AND 2 AS FULLY SET OUT ON EXHIBIT "B" ATTACHED HERTO AND MADE A PART HEREOF.

1. Lot "C" and the East half of Lots 5, 6, 7 and 8 in Section 1, Township 14 South, Range 17 East, Mount Diablo Base and Meridian, in the County of Fresno, State of California, according to the map of part of Fresno Irrigated Farms Company Tract, according to the map thereof recorded June 24, in Book 8 Page 1 of Record of Surveys, in the Office of the County Recorder of said County.

Excepting therefrom all rights title and interest in and to all oil, gas, minerals and hydrocarbon substances lying or underlying and produced and saved from five hundred (500) feet or more below the surface of the Property. The parties agree, however, that the grantor shall not have the right of surface entry on or from that part of the Property which is presently within the boundaries of the incorporated area of the city of Kerman, as reserved by Pacific Agricultural Services, Inc., in deed recorded August 11, 1978 in Book 7054 Page 67 of Official Records, Document No. 88125. (description per exhibit "B" attached hereto)

APN: 20-120-07S.

DFW

CAB
M.U.B.

including all appurtenances and easements used or connected therewith, all water and water rights (whether riparian, appropriative, or otherwise, and whether or not appurtenant) now or hereafter used or connected therewith, all shares of stock evidencing the same, pumping stations, engines, machinery, pipes and ditches, including also all gas, electric, cooking, heating, cooling, air conditioning, refrigeration and plumbing fixtures and equipment which have been or may hereafter be attached in any manner to any building now or hereafter on the said property, or to the said property, and also the rents, issues and profits thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given to and conferred upon the Beneficiary to collect and apply such rents, issues and profits.

FOR THE PURPOSE OF SECURING: (1) Payment of the sum of $ 500,000.00 with interest thereon according to the terms of a promissory note or notes dated June 16, 1981, made by Trustor, payable to the order of the

D-2

FRESNO COUNTY RECORDERS OF

current Pres. & Pacific Agriculture Services

accountant

EXHIBIT "A"

BOOK 7754 PAGE 256

TRUSTORS

GEORGE KELYEA and JOAN C. KELYEA, husband and wife as community property as to an undivided 10% interest;

STUART A. KNOWLES, a single man, as to an undivided 7.5% interest;

STEPHEN BARNETT and JANE BARNETT, husband and wife as community property as to an undivided 10% interest;

BRIDGEGATE, LIMITED, a limited California Partnership, as to an undivided 8% interest;

LAWRENCE R. KNOWLES and MARILYN R. KNOWLES, husband and wife as community property as to an undivided 1.61% interest.

JAMES R. MAXWELL and C. PRISCILLA MAXWELL, husband and wife as community property as to an undivided 1% interest;

HOLLAND L. EWELL, a married man as his separate property, as to an undivided 7.11% interest;

WESLEY R. BENNETT and MARGARET V. BENNETT, husband and wife as community property as to an undivided .94% interest; (owner of Bonsal Vineyards thru Pacific Ag.

DONALD L. HOWARD and MELISSA ANN HOWARD, husband and wife as community property as to an undivided 1.35% interest;

THOMAS J. TUSAN and DIANA D. TUSAN, husband and wife as community property, as to an undivided 3% interest;

E. ROBIN WEISER, M.D. and NANCY P. WEISER, husband and wife as community property, as to an undivided 10% interest;

STEVEN J. BLOCK and MELANIE A. BLOCK, husband and wife as community property, as to an undivided 10% interest;

C.A. RAYMILLER and M.A. RAYMILLER, husband and wife as community property as to an undivided 5% interest;

TOM ELLITHORPE and PEGGY S. ELLITHORPE, husband and wife as community property as to an undivided 3.33% interest.

ANGELO L. FERRARI and JEAN L. FERRARI, husband and wife as community property, as to an undivided 5% interest;

CURTIS A. COLE and MARGARET A. COLE, husband and wife as community property, as to an undivided 5% interest;

NANCY COLE, a single woman, as to an undivided 2% interest;

ROBERT E. COYLE and FAYE B. COYLE, husband and wife as communityproperty, as to an undivided 5% interest;

MICHAEL GARY WOODS and SUSAN LYONS WOODS, husband and wife as community property, as to an undivided 3.33% interest;

DENNIS RICHARD WOODS and CHERYL L. WOODS, husband and wife as community property, as to an undivided 3.33% interest;

PHYLLIS M. EVANS, a widow, as to an undivided 7.5% interest;

7754 OFF

11 Trustors
June 16, 1981

BEST AVAILABLE COPY

RECORDING REQUESTED BY

AND WHEN RECORDED MAIL TO

Steven Barnett
RED ROBIN ORCHARDS
1111 Van Ness
Fresno, CA 93721

MAIL TAX STATEMENTS TO

Same as above

85133239

RECORDED IN OFFICIAL RECORDS OF FRESNO COUNTY, CALIFORNIA
AT 35 MIN PAST 3 P M
DEC 31 1985
GALEN LARSON, County Recorder
FEE $27.-

PROPERTY TRANSFER TAX PAID $123.75 FRESNO COUNTY

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Partnership Grant Deed

TO 1875 CA (12 76)

THIS FORM FURNISHED BY TICOR TITLE INSURERS

A P N 373-080-47

The undersigned grantor(s) declare(s):
Documentary transfer tax is $ 123.75 .
( ) computed on full value of property conveyed, or
(X) computed on full value less value of liens and encumbrances remaining at time of sale.
( ) Unincorporated area: ( ) City of _____, and

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, Red Robin Orchards Partnership

a General partnership organized under the laws of the State of California

hereby GRANTS to Stephen Barnett, a married man as to an undivided 36.47% interest and Robert E. Coyle, a married man as to an undivided 63.53% interest.

the following ~~described real property in the~~
County of Fresno , State of California:

See attached copy of the legal description consisting of one (1) page attached hereto.

GAIL FLYNN
NOTARY PUBLIC CALIFORNIA
PRINCIPAL OFFICE IN
FRESNO COUNTY
My Commission Expires Dec. 4 1989

Dated: December 30, 1985

STATE OF CALIFORNIA
COUNTY OF Fresno } ss.

On December 30, 1985 before me, the undersigned, a Notary Public in and for said State, personally appeared Vernal A. Amaro, Richard H. Cook

known to me to be two of the partners of the partnership that executed the within instrument, and acknowledged to me that such partnership executed the same.
WITNESS my hand and official seal.

Signature Gail Flynn
Gail Flynn

By Vernal A. Amaro, Trustee for the 1984 Cook Children Trust

By Richard H. Cook, Trustee for the 1984 McCarthy Children Trust

(This area for official notarial seal)

Title Order No. _____ Escrow or Loan No. _____

MAIL TAX STATEMENTS AS DIRECTED ABOVE

FRESNO COUNTY RECORDERS OFFICE

DEC 31 1985

D-4

BEST AVAILABLE COPY

85133239

EXHIBIT "A"

Approximately 114.88 acres, further described as;

Parcel #1-lots 4, 5, 6, 7 and 8 of Mira Vale Colony, County of Fresno, according to map thereof recorded in book 3 page 35 of record of surveys, records of said County.

EXCEPT therefrom any portion lying within the north 40 feet of Section 16, Township 15 south, Range 24 east, Mount Diablo Base and Meridian, according to the United States Government Township Plats, conveyed to Alta Irrigation District by The California Fruit and Wine Lane Company by deed dated December 26, 1891, recorded October 20, 1892 in book 153, page 81 of deeds.

Parcel #2-lot 9 of Mira Vale Colony, County of Fresno, according to map thereof recorded in book 3 page 35 of record of surveys, records of said County.

EXCEPT therefrom the north 10 feet of said Lot 9 included within the boundaries of the 40 foot strip conveyed to Alta Irrigation District for ditch purposes by deed dated December 26, 1891 recorded October 20, 1892 in book 153 page 81 of deeds.

Parcel #3-lot 10 of Mira Vale Coloney, in the County of Fresno, according to map thereof recorded in book 3 page 35 record of surveys, records of said County.

EXCEPT therefrom any portion lying within the north and west 40 feet of section 16, Township 15 south, Range 24 east, Mount Diablo Base, Meridian according to United States Government Township Plats, conveyed to Alta Irrigation District by the California Fruit and Wine Land Company by deed dated December 26, 1891 recorded on October 20, 1892 in book 153 page 81 of deeds.

All included within Assessors Parcel Number 373-080-47

STATE OF CALIFORNIA

COUNTY OF FRESNO

On December 30, 1985 before me, the undersigned, a Notary Public in and for said State, personally appeared Vernal A. Amaro, trustee for the 1984 Cook Family Trust, and Richard H. Cook, trustee for the 1984 McCarthy Children Trust known to me to be the partners of the partnership that executed the within instrument, and acknowledgeed to me that such partnership executed the same.

WITNESS my hand an official seal.

GAIL FLYNN

Signature: Gail Flynn

FRESNO COUNTY RECORDERS OFFICE

DEC 31 1985